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Stephen Wong Leong Kiong v HSBC Bank Malaysia Bhd (formerly known as Hongkong Bank (M) Bhd)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO N-03–49 OF 2005
DENIS ONG, HASHIM YUSOFF AND ZALEHA ZAHARI JJCA
18 MAY 2009

Bankruptcy — Bankruptcy proceedings — Creditor's petition — Defect in creditor's petition — Whether defect fatal

This was an appeal by the judgment debtor ('JD') against the decision of the High Court which had affirmed the registrar's decision dismissing the JD's application to dismiss the creditor's petition pursuant to s 6(3) of the Bankruptcy Act 1967 ('the Act'). The crux of the appeal was whether a formal defect would invalidate the bankruptcy proceedings. The JD argued that the creditor's petition was defective and of no legal effect as the date of bankruptcy should have been 7 June 2001 and not 2 June 2001 as stated in the creditor's petition. The learned High Court judge in reckoning what was the correct date of the act of bankruptcy found it to be the 7 June 2001 and not 2 June 2001. However, the learned High Court judge found there was no substantial injustice caused by the mere misstatement of the date of the act of bankruptcy.

Held, allowing the appeal with costs:
Bankruptcy proceedings are of a quasi-penal nature, and so it is imperative that procedural requirements are strictly complied with. In the circumstances, the High Court should have followed what was stated by the court in *Hamidah bte Abdul Hamid & Anor v Polynesia Offshore Supplies (M) Bhd* [1990] 3 MLJ 94 and give effect to s 6(3) of the Bankruptcy Act 1967 of the Act. The learned judge, having found that the date of the act of bankruptcy was wrong, should have allowed the JD's appeal and dismissed the petition (see paras 10-12).

[Bahasa Malaysia summary

Ini adalah rayuan pemiutang kehakiman ('JD') terhadap keputusan Mahkamah Tinggi yang mengesahkan keputusan pendaftar menolak permohonan JD untuk menolak petisyen penghutang berikutan s 6(3) Akta Kebankrapan 1967 ('Akta'). Isu rayuan adalah sama ada kecacatan formal akan mentaksahkan prosiding kebankrapan. JD menghujah bahawa petisyen penghutang adalah cacat dan tidak mempunyai kesan dari segi undang-undang kerana tarikh kebankrapan sepatutnya adalah 7 Jun 2001 dan bukan 2 Jun 2001 seperti yang dinyatakan di dalam petisyen penghutang. Hakim Mahkamah Tinggi yang bijaksana dalam mengira sebagai tarikh yang betul di

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dalam tindakan kebankrapan mendapati ia adalah 7 Jun 2001 dan bukan 2 Jun 2001. Walau bagaimanapun, hakim Mahkamah Tinggi yang bijaksana mendapati bahawa tidak ada ketidakadilan yang substansial yang berlaku semata-mata kerana kesilapan menyatakan tarikh di dalam tindakan kebankrapan.

Diputuskan, membenarkan rayuan dengan kos:
Prosiding kebankrapan adalah bersifat separa hukuman, dan oleh itu adalah penting bahawa keperluan prosedur diikuti dengan tegas. Dalam hal keadaan tersebut, Mahkamah Tinggi sepatutnya mengikuti apa yang dinyatakan oleh mahkamah di dalam kes *Hamidah bte Abdul Hamid & Anor v Polynesia Offshore Supplies (M) Bhd* [1990] 3 MLJ 94 dan memberi kesan kepada s 6(3) Akta. Hakim yang bijaksana, selepas mendapati bahawa tarikh kebankrapan adalah salah, sepatutnya membenarkan rayuan JD dan menolak petisyen tersebut (lihat perenggan 10-12).]

Notes:

For cases on creditor's petition, see 1(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2773–2809

Cases referred to

Abdul Hamid & Anor v Polynesia Offshore Supplies (M) Bhd [1990] 3 MLJ 94, CA (folld)

Arif bin Sionggong, Re; ex parte Arab Malaysian Finance Bhd [1995] 3 MLJ 252, HC (refd)

Fadzil bin Othman, Re; ex parte Malayan Banking Bhd [1994] 2 MLJ 474, HC (refd)

Liow Fong Mooi, Re; ex parte Malayan Banking Bhd [2000] 6 MLJ 146, HC (refd)

Pg Ahmad bin Pg Haji Abdullah, Re; ex parte Oriental Bank Bhd [1991] 3 CLJ 2899, HC (refd)

Legislation referred to

Bankruptcy Act 1967 ss 6(3), 93(3), 131

Appeal from: Bankruptcy No 29–155 of 2001 (High Court, Seremban)

LH Chua (LH Chua) for the appellant.
Norazam bin Mohd Daud (Stanley Ponniah, Ng & Soo) for the respondent.

Hashim Yusoff JCA:

[1] This is an appeal by the judgment debtor ('the JD') against the decision of the High Court at Seremban which had affirmed the court registrar's decision dated 8 November 2002, in dismissing with costs the JD's application

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by summons in chambers (encl 8) to dismiss the creditor's petition ('the CP') pursuant to s 6(3) of the Bankruptcy Act 1967 ('the Act'). The appeal was unanimously allowed with costs. We now give our reasons.

[2] The crux of this appeal is whether a formal defect would invalidate the bankruptcy proceedings?

[3] At the hearing of this appeal we requested learned counsel for the respondent to submit first.

[4] Learned counsel for the respondent refer to s 131 of the Act which provides:

> 131 Formal defect not to invalidate proceedings
>
> No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of the court.

[5] He then cited two High Court authorities ie *Re Arif bin Sionggong; ex parte Arab Malaysian Finance Berhad* [1995] 3 MLJ 252 and *Re Liow Fong Mooi; ex parte Malayan Banking Bhd* [2000] 6 MLJ 146; where Tee Ah Sing JC (as he then was) in the former case and Clement Skinner JC (as he then was) in the latter held that an error in stating the date in which the act of bankruptcy took place was an irregularity only which was remediable under s 131 of the Act as no substantial injustice has been caused by it.

[6] Further, it was argued that s 93(3) of the Act enables the court at any time to amend any written process or proceeding upon such terms, if any, as it thinks fit to impose.

[7] However, learned counsel for the appellant argued that in *Re Liow's* case, there was a formal application made by the judgment creditor ('the JC') to amend the date of the act of bankruptcy as opposed to the case in the instant appeal where there was none made by the JC. But it was on the learned High Court judge's own volition that he amended the date. It was submitted before us that the learned High Court judge should not have done so.

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[8] Before the High court, learned counsel for the JD had argued that the CP was defective and of no legal effect as the date of bankruptcy should have been 7 June 2001 and not 2 June 2001 as stated in the CP. The learned High Court judge in reckoning what was the correct date of the act of bankruptcy found it to be the 7 June 2001 and not 2 June 2001 as stated in para 4 of the CP (see p 27 of the appeal record).

[9] However, the learned High Court judge subscribed to the concurrent views of Tee Ah Sing JC (as he then was) and Clement Skinner JC (as he then was) and disagreed with the decision of Richard Talalla J (as he then was) who held that the effect of the misstatement of the date of the act of bankruptcy was fatal (see *Re Fadzil bin Othman; ex parte Malayan Banking Bhd* [1994] 2 MLJ 474).

[10] Although the learned High Court judge in the instant appeal was mindful of the statement of the Court of Appeal of Brunei in *Hamidah bte Abdul Hamid & Anor v Polynesia Offshore Supplies (M) Bhd* [1990] 3 MLJ 94, which was followed by Syed Ahmad Idid J (as he then was) in *Re Pg Ahmad bin Pg Haji Abdullah; Ex parte Oriental Bank Bhd* [1991] 3 CLJ 2899, that bankruptcy proceedings are of a quasi-penal nature, and so it is imperative that procedural requirements are strictly complied with, yet His Lordship found there was no substantial injustice caused by the mere misstatement of the date of the act of bankruptcy. We however agree with the view expressed by the Brunei Court of Appeal in the matter.

CONCLUSION

[11] With utmost respect to the learned High Court judge, we think that the High Court should have followed what was stated by the Court of Appeal in *Abdul Hamid*'s case, and give effect to s 6(3) of the Act which provides:

> 6(3) If the court is not satisfied with the proof of the petitioning creditor's debt or of the act of bankruptcy or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the court may dismiss the petition.

[12] On the facts of the instant appeal the learned judge had found that the date of the act of bankruptcy was wrong, then His Lordship should have allowed the JD's appeal and dismissed the petition.

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[13] For the above reasons, we allowed this appeal with costs and ordered the deposit to be refunded to the appellant. The order of the High Court is set aside.

Appeal allowed with costs.

Reported by MF Ibrahim